Supreme Court of the United States

OCTOBER TERM, 1940

No. 453

JONAS WEILL,

Plaintiff,

against

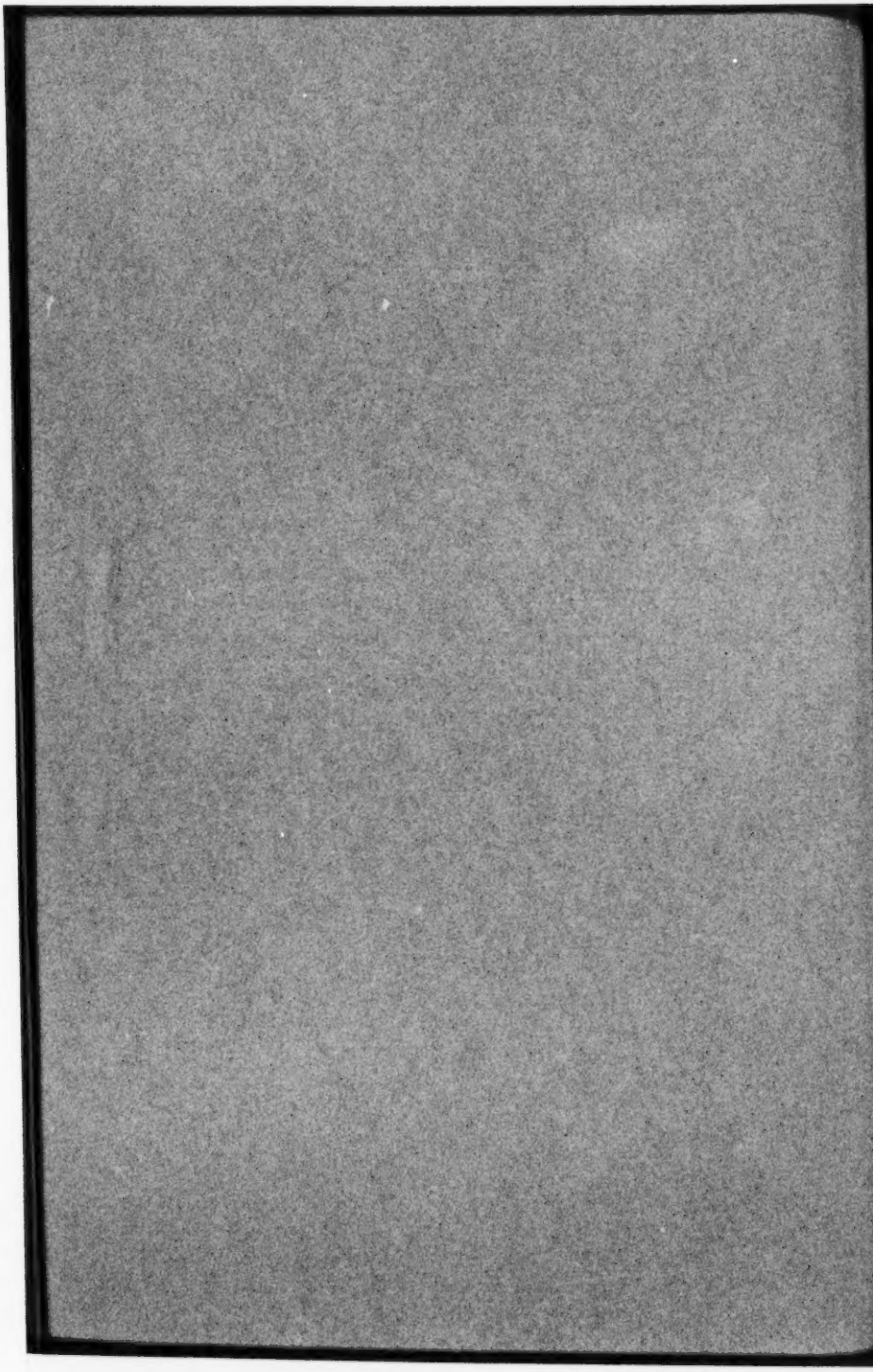
COMPAGNIE GENERALE TRANSATLANTIQUE,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BERNARD GORDON,
ERNEST W. LEVEY,
Counsel for Petitioner.

DAVID J. COLTON,
Attorney for Petitioner.



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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Jonas Weill, prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Second Circuit entered on August 5, 1940, reversing a judgment of the United States District Court for the Southern District of New York. The judgment was entered upon a jury verdict in favor of the plaintiff, in an action for damages arising out of personal injuries sustained by him while a first-class passenger on defendant's vessel *Champlain*.

Summary Statement of the Matter Involved.

Plaintiff proved without contradiction or dispute that at about 3 P. M. on December 21, 1938, while a first-class passenger on defendant's steamship *Champlain,* which was approaching its New York pier (R. 53), he sustained severe and permanent injuries to his lower right leg while walking on the promenade deck (R. 54, 59). He emerged through a door at a regular entrance to this promenade deck on the port side near the forward end, turned right looking forward but not down at his feet, took four or five unhurried steps (R. 67, 98, 100) when his right foot caught and was hooked and held fast under a canvas covering or tarpaulin at its beginning or edge at about the center, where there was a bulge 6 inches high (R. 61-2, 64-5). The tarpaulin was located near this regular entrance—about 10 feet away (R. 66). It was wholly without fastening and the section where it lay was not roped off (R. 122). With his foot thus hooked, his weight as he fell was thrown down upon his injured limb, breaking it. He then saw that the bulge was 6 inches high (R. 61, 96).

That the bulge described by the plaintiff existed in the tarpaulin at the time and place of the accident was neither contradicted nor disproven by any other evidence. Plaintiff's uncontradicted testimony is that he felt his foot hooked and held in the fold or bulge (R. 59, 97), and that when he fell, and while his foot was still trapped in the bulge, he saw it (R. 96).

By stipulation, defendant admitted that it had the tarpaulin at the place in question at the time plaintiff met with his injury (R. 50, 146). There was no tarpaulin on this deck earlier that day (R. 60). Plaintiff had no notice of its presence or of the condition in which it was laid by defendant (R. 61, 99).

The visibility at the time and place of the accident was very poor; the deck on which plaintiff fell was on the side of the boat going toward the pier (R. 54); it had a solid ceil-

ing and a solid understructure halfway up at the rail (R. 56-7); the tarpaulin was a darkish color (R. 93); and it was a dull, dismal afternoon, cloudy, with no sunshine (R. 58, 85, 148).

These facts were wholly uncontradicted by defendant; and defendant does not dispute the injuries sustained (R. 166).

Defendant rested at the close of plaintiff's case, and moved to dismiss the complaint on the ground that plaintiff had failed to prove any actionable negligence, or to prove notice to defendant, and for contributory negligence of plaintiff, which motion was denied (R. 125, 127). The trial judge submitted the case to the jury, under instructions to which neither side excepted.

The issues submitted to the jury for determination were, whether or not defendant had been negligent, whether or not plaintiff had been free from contributory negligence, and the amount of the damages. The jury brought in a verdict for plaintiff. This the defendant moved to set aside, which motion was also denied (R. 139). On April 2, 1940, judgment for $3,088.98 was duly entered in favor of plaintiff. Defendant stipulated that this verdict was not excessive (R. 166).

Defendant appealed to the Circuit Court of Appeals for the Second Circuit, which, on July 11, 1940, reversed the judgment of the District Court and directed dismissal of the complaint, supporting its decision with a citation of assumed facts which appear nowhere in the record. A rehearing was denied on August 1, 1940. On August 14, 1940, judgment was entered thereon in favor of defendant.

Jurisdiction of This Court.

The order of the Circuit Court of Appeals was made on August 5, 1940 (R. 70); the statutory provision under which the jurisdiction of this Court is invoked is Section 240(a) of the Judicial Code, as amended by Act of Feb. 13, 1925; 28 U. S. C., Ch. 9, Sec. 344.

Questions Presented.

1. By reversing the jury's verdict and the judgment entered thereon in favor of plaintiff, did the Circuit Court of Appeals for the Second Circuit violate the constitutional right of plaintiff of trial by jury, in this civil trial?

2. On the uncontradicted facts in the record, as reviewed above, was the trial court bound to dismiss the complaint and give judgment for defendant, on the ground that defendant was not negligent, or that plaintiff was guilty of contributory negligence, *as a matter of law*—or, was it proper for the trial court to submit the case to the jury to decide whether or not defendant was negligent, and whether or not plaintiff was free from contributory negligence, *as a matter of fact?*

Errors Relied On.

The reversal by the Circuit Court of Appeals was based on its substantial misconception of the evidence, inasmuch as it cites, as bases therefor, three hypotheses which are absolutely without foundation in the evidence:

1. That the bulge in the tarpaulin which caused plaintiff to fall may have been caused by plaintiff stubbing his toe against its edge, whereas the testimony is clear that plaintiff's foot was "hooked" and "caught" in the fold;
2. That plaintiff walked heedlessly along, whereas the only evidence is that plaintiff walked leisurely, as he usually walked, looking ahead but not right at his feet; and
3. That the accident occurred in "plain daylight", whereas the evidence is that the light conditions were extremely poor.

The decision below is also based upon an erroneous finding that there are no facts whatever to warrant a finding of defendant's negligence. The following facts, specifically proved and uncontroverted, were entitled to be considered and evaluated by a jury:

1. That defendant had the tarpaulin at the site of the accident, upon the promenade deck, where plaintiff as a first-class passenger was invited to walk;

2. That it was laid without fastening, in a place where and at a time when light conditions were very poor, only 10 feet from a door of the deck structure;

3. That a bulge existed in which plaintiff caught his foot, and felt his foot caught, and observed the bulge while his foot was still in it; and

4. That no warning was given plaintiff and the place was not roped off or otherwise guarded.

These are all *facts, not inferences,* which are very persuasive of defendant's negligence and inconsistent with any other theory. The jury alone was entitled to decide upon the basis of this factual evidence, whether defendant was guilty of negligence and whether plaintiff was free from contributory negligence.

Reasons for Granting the Writ.

It is clear from the foregoing that the Circuit Court of Appeals for the Second Circuit has decided an important question of law, to wit, the extent of its authority to set aside a jury verdict and to dismiss a complaint, in a way which is in conflict with local decisions, its own previous decisions, decisions of the Circuit Court of Appeals for other circuits, decisions of the Supreme Court of the United States, and in a way which is contrary to the public policy of our law and which tends to vitiate a fundamental right of every citizen—the constitutional guarantee of the right of trial by jury in civil actions.

It is a universal rule that where the evidence is undisputed, as in this case, a court may dismiss the complaint or direct a verdict only when "a recovery is impossible under any view that can properly be taken of the facts"; and all the evidence and reasonable inferences therefrom must be considered in the light most favorable to the plaintiff. The evidence must be so conclusive against the plaintiff that all reasonable men, in the exercise of an honest and impartial judgment, can draw but one conclusion therefrom.

In this case, the Circuit Court of Appeals not only failed to consider all evidence and inferences in the light most favorable to plaintiff, but, contrary to the decisions of local courts, its own previous decisions, and the decisions of Circuit Courts of Appeals of other circuits, as well as decisions of this august Court, it resorted to conjecture and surmise, not based upon any evidence in the case, to support its decision, thereby depriving plaintiff of his constitutional right to trial by jury; and this Court alone has power to correct this serious error. The necessity for granting the writ also lies in the important effect of the ruling of the Circuit Court of Appeals upon the law of common carriers, generally. The extent of proof necessary to establish a *prima facie* case of negligence against a common carrier is a matter of great concern to many litigants in the Federal Courts, particularly steamship passengers. This ruling of the Circuit Court of Appeals for the Second Circuit establishes a precedent contrary to the well-recognized rules of law applicable to cases of this character.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari to review the order of the Circuit Court of Appeals for the Second Circuit be granted.

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